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In The

Supreme Court of the United States

October Term, 1961

No. 95

MILK TRANSPORT, INC., Appellant,

vs.

UNITED STATES OF AMERICA, et al.

On Appeal from the United States District Court
For the District of Minnesota

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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I.

REPLY TO MOTION TO AFFIRM OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

The respondents, United States and the Interstate Commerce Commission, argue that Sec. 7(c) "grandfather" rights were intended by Congress to be restricted to carriers of those commodities named in the second proviso of Sec. 7(a) —frozen fruits, frozen berries, etc., to the exclusion of the commodities included in the first proviso of Sec. 7(a). This argument is, we believe, completely answered by the fact that Sec. 7(c) confers "grandfather" rights on existing carriers of commodities "made subject to" Part II of the Interstate Commerce Act "by *paragraph (a)* of this section." Sec. 7(c) does *not* state "*the second proviso* of paragraph (a)," and it

can safely be concluded that if Congress intended such a limited effect, it would have said so.

The respondents attempt to buttress their argument by the observation that, prior to the Act of 1958, only one Commission decision, *Watkins Motor Lines, Inc., Interpretation of Certificate*, 64 M.C.C. 445 (1955), dealt with citrus juices, and that the Commission therein held citrus juices to be non-exempt. The respondents then observe that the Act of 1958 was enacted before a federal court had the opportunity to rule on the status of citrus juice under former Sec. 203(b)(6). Therefore, it is said that, since a court had not had such an opportunity, the status of citrus juice prior to 1958 was non-exempt and the issue is now and forevermore foreclosed. The fallacy in this argument is that the *Watkins* case, supra, is merely a Commission interpretation of former Sec. 203(b)(6) and is not conclusive. If the *Watkins* case, supra, was wrong, in the light of the Supreme Court's interpretation of former Sec. 203(b)(6),[1] then citrus juices *were* "exempt" prior to the Act of 1958. This question can be decided now just as well as before the Act of 1958.

The appellant submits that it is clear that prior Commission decisions on the status of commodities under former Sec. 203(b)(6) were rendered authoritatively worthless after this Court announced the "continuing substantial identity" test in the *East Texas* case, supra.

The application of the "grandfather" rights of Sec. 7(c) depends upon the legal status of the commodity, before the Act of 1958, under former Sec. 203(b)(6) as interpreted by the Supreme Court, and upon the status after the Act of 1958. The status must have been changed by Sec. 7(a) of the Act of 1958 from "exempt" to "non-exempt."

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[1] In *East Texas Motor Freight Lines, Inc., v. Frozen Food Express*, 351 U.S. 49; *Frozen Food Express v. United States*, 148 F. Supp. 399, aff'd 355 U.S. 6, among others.

The application of the "grandfather" rights of Sec. 7(c) cannot depend upon whether an appropriate case or controversy involving a commodity such as citrus juices happened to reach the Courts before the Act of 1958 was enacted.

The respondents have begged the question when they state on page 7 of their Motion:

> "The flaw in this argument is that the first proviso, unlike the second, does not purport to subject any type of the previously exempt transportation to Commission regulation. It merely continues the status as exempt or non-exempt of various commodities previously classified by the Commission on the basis of then controlling interpretations of the Act."

The very issue in this case is whether or not citrus juices were merely "continued" as non-exempt by the first proviso of Sec. 7(a) or whether citrus juices were exempt prior to Sec. 7(a) and were, therefore, "made subject to" Part II of the Interstate Commerce Act by Sec. 7(a). Appellant contends the latter, and if appellant is correct, the Sec. 7(c) "grandfather" clause is applicable and the matter must be remanded to the Commission.

The respondents accurately state the issue on page 7 of their Motion as follows:

> "The first proviso can thus be said to have 'made' particular commodities 'subject to' the Act only to the limited extent that the commodity was erroneously classified as 'not exempt' in the Commission Ruling 107 * * *."

One way of stating appellant's contention is that Ruling 107 does not accurately reflect the status of citrus juice under former Sec. 203(b)(6) as interpreted by the Supreme Court.

We might observe that Ruling 107 is not a ruling at all, but is merely a collection of various Court and Commission decisions prepared by the Commission to assist Congress in

drafting Sec. 7(a). The Congress merely incorporated Ruling 107 by reference for ease of draftsmanship. See *Inland Motor Freight "Grandfather" Application*, 83 M.C.C. 543. The first proviso of Sec. 7(a), with respect to citrus juices, should be read as if Congress had expressly stated:

> "The transportation of citrus juice is declared to be not exempt from the provisions of Part II of the Interstate Commerce Act."

The resort to the legislative history by the respondents aids them little. The House Report,[2] cited by respondents, indicates that carriers of the 11 specified commodities in the second proviso of Sec. 7(a) were to be given "grandfather" rights, a proposition with which appellant agrees. However, there is no language in the House Report which would indicate that the "grandfather" rights were to be limited to those carriers only. At best, the House Report is equivocal on that point.

The Senate Report,[3] on the other hand, comes even closer to Congress' true intent. It is stated:

> "Grandfather rights would also be provided. Any person engaged on January 1, 1958, in trucking commodities brought back under regulation by the above-described amendment of Section 203(b)(6) would be entitled to a Certificate or permit allowing him, under regulation, to continue hauling the same commodities within the same areas or between the same points."
>
> S. Rep., p. 23.

The Senate here refers to *any* commodity whose status, under law, was altered from "exempt" to "not exempt" by Sec. 7(a). No restrictive intent is indicated by the Senate Report.

Congress was clearly aware that under the Supreme Court's interpretation of former Sec. 203(b)(6) in the *East*

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[2]H. Rep. No. 1922, 85th Congress, 2nd Session.

[3]S. Rep. No. 1647, 85th Congress, 2nd Session.

Texas case, supra, and other cases, many commodities were, in law, "exempt," that had been previously held by the Commission to be not exempt. Congress was also aware that the previous holdings of the Commission on this subject conflicted so markedly with the Supreme Court's decision in the *East Texas* case, supra, that almost all of the Commission's decisions were nullified. Congress was also aware, then, when the first proviso of Sec. 7(a) made these commodities "not exempt" by statute that existing carriers of these commodities were being legally "made subject to" Part II of the Interstate Commerce Act for the first time. Congress then commendably preserved these carrier's existence by means of a "grandfather" clause, although after the Act of 1958 new carriers of those commodities would be required to seek certification under the regular provisions of Sec. 207 of Part II of the Interstate Commerce Act.

Congress may have the harsh power to refuse grandfather rights as it chooses, but this does not mean, as the lower court seemed to believe, that Congress in fact exercised that power with respect to citrus juice.

II.

REPLY TO THE MOTION TO AFFIRM OF INTERVENORS ALTERMAN AND REFRIGERATED

The intervenors have at least recognized that the only issue in this case is whether citrus juices were exempt, under the law, prior to the Act of 1958, although the intervenor's arguments in this respect are totally fallacious.

The intervenors, like the Commission in the *Watkins* case, supra, take the approach that citrus juice has no resemblance to the citrus fruit and that the act of extraction constitutes manufacturing. Both the intervenor and the Commission ignore the fact that citrus juice, itself, is created by nature

within the fruit as a separate element. The juice is contained in small readily observable sacs. Extraction does nothing more than rupture the sacs and free the juice. The juice is identical before and after extraction, in taste, appearance, and molecular structure. Whether inside or outside of the fruit, juice is still juice. Pasteurization and prechilling have no more significance than in the case of milk, which has always been held exempt by the Commission. See *East Texas Motor Freight Lines, Inc., v. Frozen Foods Express*, 351 U.S. at 53.

The creation of citrus juice, it seems obvious, lies elsewhere than in the hands of man.

We cannot grasp the relevancy of the intervenors' lengthy comments about canned tomatoes. We are talking here about citrus juice. Milk Transport, the appellant, proposes, if its applications are eventually granted by the Commission to transport citrus juices *in bulk*, in large insulated tank trailers, not in packages or cans. The canning of agricultural commodities may create problems regarding their status under Sec. 203(b)(6), but those problems are not present in this case.

The intervenors also comment that there may be many types of processing in the citrus juice industry and that there is no record in this case upon which to render a decision on this point. The lack of a record is due entirely to the Commission's arbitrary action in dismissing appellant's application without a hearing. However, a detailed description of the processing of citrus juices from company to company is not necessary, for it is clear that the act of extraction itself is the point of divergence between the appellant and the Commission. The appellant contends that extraction is not manufacturing, but merely constitutes the freeing of nature's product from its natural environment. The Commission ap-

parently believes that extraction is creative and is, therefore, "manufacturing."

There is no need to compile a record to establish that citrus juice is extracted from a citrus fruit, since there must be extraction of some kind to make citrus juice available to mankind, and the Court can take notice of this fact.

III.

CONCLUSION

The variety of approaches to this case is unusual.

The intervenors and the Commission (in its original Order, at least) take the view that the Sec. 7(c) "grandfather" clause is inapplicable because, under former Sec. 203(b)(6), citrus juices were a manufactured product and non-exempt, and therefore there had been no change of status from "exempt" to "non-exempt" by Sec. 7(a), as is required for Sec. 7(c) to apply.

The appellant contends that this is indeed the issue, but that citrus juices are not manufactured, and were, therefore, exempt prior to the Act of 1958, and that Sec. 7(a) "made" citrus juices "subject to" Part II.

The lower court, on the other hand, determined that the status of citrus juice prior to the Act of 1958 is immaterial, and that even if citrus juices were "made subject to" Part II by Sec. 7(a), the "grandfather" rights still do not apply, being restricted to carriers of the second proviso commodities of Sec. 7(a).

The Government's counsel, however, appear to argue that citrus juices were not exempt prior to the Act of 1958, because the old *Watkins* case, supra, had not been appealed and the Courts did not have time to rule specifically on citrus juices before the Act of 1958 was enacted. The respondents apparently saw this matter as some sort of a race to see

whether the Interstate Commerce Commission could reach Congress before Milk Transport could reach the federal courts.

The variety of approaches here, and the obvious necessity of an authoritative decision on this important subject matter, require plenary review by this Court.

Government counsel, by failing to support the Commission's original Order in this case, have apparently conceded that the Commission was initially in error. The intervenors, on the other hand, see so little merit in the lower court's decision that they choose to support the Commission's original order instead. Certainly, this case cannot be disposed of on a motion to affirm, unless it be to summarily reverse the lower court for its very clear error and remand to the Commission for the relief prayed for. The motions to affirm should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Perry R. Moore, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 28 day of ~~August~~ July, 1961, I served copies of the foregoing document on the several parties hereto, as follows:

1. On the United States, by mailing copies thereof in duly addressed envelopes with air mail postage prepaid, to Archibald Cox, the Solicitor General, Department of Justice, Washington 25, D. C., Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C., and Richard I. Solomon, Attorney, Department of Justice, Washington 25, D. C., and by mailing copy thereof in a duly addressed envelope, postage prepaid, to Miles Lord, United States Attorney, Federal Courts Building, St. Paul, Minnesota.
2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to Robert W. Ginnane, General Counsel, and Fritz R. Kohn, Attorney, Interstate Commerce Commission, Washington 25, D. C.
3. On the intervenors, by mailing a copy thereof, in a duly addressed envelope, with air mail postage prepaid, to Frank B. Hand, Esq., and Daniel B. Johnson, Esq., Transportation Bldg., Washington 25, D. C.

PERRY R. MOORE